BEFORE A HEARING OFFICER
OF THE SUPREME COURT OF ARIZONA

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA,	)	File No 06-0946
DAVID W. GREGAN **Bar No. 016196**	)	**HEARING OFFICER'S REPORT**
RESPONDENT	)	

PROCEDURAL HISTORY

1 Probable cause was found in this matter on March 1, 2007, and the State Bar filed a Complaint against Respondent on March 28, 2007 Service was made on or about March 30, 2007 The matter was assigned to Hearing Officer Donna Lee Elm on April 4, 2007. Respondent filed his Answer on April 20, 2007 The initial case management conference was held on May 21, 2007, and a Case Management Order was issued on May 29, 2007, setting the final hearing on the merits in this matter on July 27, 2007 After certain issues were resolved through motion practice, Hearing Officer Elm recused herself on July 17, 2007, as a result of a conflict The undersigned Hearing Officer was assigned to the case on July 24, 2007

2 Prehearing evidentiary issues were briefed and ruled on by this Hearing Officer on September 6, 2007, and a contested hearing was held in this matter on September 7, 2007

FINDINGS OF FACT

3 At all times relevant hereto, Respondent was a member of the State Bar of Arizona, having been admitted on May 20, 1995

4 On or about August 12, 2005, Respondent was selected to serve as arbitrator in the matter of *Kelleher v Lasker,* Maricopa County State of Arizona, Superior Court cause number CV2003-024394.

5 Respondent's selection as arbitrator was made pursuant to Rule 73, Ariz R Civ P , by minute entry of the Court Administrator under the supervision of the Honorable Rebecca Albrecht Superior Court Judge

6 On October 3, 2005, Respondent wrote a letter to the attorney for one of the parties in *Kelleher v Lasker* and announced, "I will not serve as an arbitrator " See Bates Stamped Document #000055 under Tab 3 of State Bar's exhibits to hearing.

7 On October 3, 2005, Respondent wrote a letter to the Honorable Peter Swann asking to be removed as arbitrator in the *Kelleher v Lasker* case, and on December 21, 2005, Judge Peter Swann issued a ruling in *Kelleher v Lasker* denying Respondent's requests to be excused as an arbitrator and to be removed from the arbitrator list Judge Swann's ruling was based upon the most recent opinion of the Arizona Supreme Court in *Scheehle v Justices of the Supreme Court of the State of Arizona,* 211 Ariz. 282 (October 5, 2005) See Bates Stamped Document #000035 under Tab 3 of State Bar's exhibits to hearing

8 Rather than ask the Judge for a stay of his ruling in conjunction with a special action to challenge the Court's Order that he serve as an arbitrator, Respondent disobeyed the Court's Order. See Transcript of Hearing page 13 line 20 through line 23

9 On May 8, 2006, Maricopa County Superior Court Judge Glenn Davis issued a ruling in *Kelleher v Lasker* referring the parties to a settlement conference *judge pro tem* "due to being unable to proceed with arbitration because of the Arbitrator's failure to set an arbitration hearing It appears that the assigned Arbitrator is refusing to conduct an arbitration hearing despite the Court's ruling of December 22 [*sic*], 2005 The Court is considering appropriate sanctions against the assigned Arbitrator" See Bates Stamped Document #000036 under Tab 3 of State Bar's exhibits to hearing

10 On May 9, 2006, Maricopa County Superior Court Judge Glenn Davis issued a ruling in *Kelleher v Lasker* "removing Respondent as Arbitrator in this matter." See Bates Stamped Document #000038 under Tab 3 of State Bar's exhibits to hearing

11 On May 12, 2006, Maricopa County Superior Court Judge Peter Swann issued an order in *Kelleher v Lasker* setting an Order to Show Cause/Contempt Hearing ("OSC") regarding Respondent's refusal to serve as arbitrator The OSC was ultimately scheduled and heard on June 8, 2006 See Bates Stamped Document #000039 under Tab 3 of State Bar's exhibits to hearing

12. On June 8, 2006, Maricopa County Superior Court Judge Peter Swann conducted the OSC in *Kelleher v Lasker* Respondent was present on his own behalf Judge Swann issued the following ruling.

> THE COURT FINDS that Mr Gregan was aware of a valid Court Order requiring him to serve as arbitrator in the above captioned action and that he was able to comply with that order and elected not to At the Order to Show Cause Hearing, Mr. Gregan continued to defy this Court's Order, which was made pursuant to *Scheehle v Justices of the Supreme Court of the State of Arizona,* 211 Ariz 282 (2005) Mr Gregan was unprepared to discuss the legal merits of the ruling at the hearing and declined to do so
>
> Based on the forgoing,
>
> THE COURT FINDS Mr Gregan to be in contempt of this Court's Order.

IT IS ORDERED that David W Gregan shall pay to the Clerk of the Court an assessment of $300.00

See Bates Stamped Document #000042 under Tab 3 of State Bar's exhibits to hearing

13. On July 12, 2006, Respondent filed a Notice of Appeal to the Arizona Court of Appeals of the foregoing Order of Judge Swann See Bates Stamped Document #000060 under Tab 3 of State Bar's exhibits to hearing

14 On October 6, 2006, the Arizona Court of Appeals issued its Order dismissing Respondent's appeal for lack of jurisdiction, inasmuch as there is no right of appeal from a civil contempt citation The remedy for a contempt finding, if any, is by special action. See Bates Stamped Document #000062 under Tab 3 of State Bar's exhibits to hearing

ISSUES OF LAW

15 The issues that were addressed at the contested hearing in this matter are·

1 Whether Respondent knowingly disobeyed an obligation to serve as an arbitrator in *Kelleher v Lasker*

2 Whether Respondent knowingly disobeyed an Order to serve as an arbitrator in *Kelleher v Lasker* after he knew or should have known that the Arizona Supreme Court had, in *Scheehle v Justices of the Supreme Court of the State of Arizona,* 211 Ariz 282 (dated October 5, 2005), resolved the question adverse to Respondent's position of whether an attorney in Maricopa County could be forced to serve as an arbitrator

3 Whether Respondent's refusal to sit as an arbitrator in *Kelleher v Lasker* based upon his assertion that no obligation existed was in violation of ER 3 4(c), constituted conduct prejudicial to the administration of justice in violation of ER 8.4(d), and was a willful violation of a Court Order in violation of Rule 53(c), Ariz R Sup Ct

ANALYSIS

16 Respondent has for many years taken the position that because of the wording of Arizona State Statute ARS 12-1333, (the Court) "shall maintain a list of qualified persons within its jurisdiction who have agreed to serve as arbitrators subject to the right of each person to refuse to serve in a particular case," the Maricopa County practice of requiring service as an arbitrator was defective

17. Respondent based his position on an early decision in a long lasting case, *Scheehle v Justices of the Supreme Court of the State of Arizona,* 203 Ariz 520, 384 Adv Rep 16 (decided July 26, 2001) wherein the Supreme Court of Arizona stated that A R S 12-1333 did not "confer authority to demand that attorneys serve as arbitrators" (supra at paragraph 4 and paragraph 6) Respondent also felt that ER 3.4(c) which states that a lawyer shall not knowingly disobey an obligation under the Rules of a Tribunal "except for an open refusal based on an assertion that no valid obligation exists" supported his refusal to serve as an arbitrator

18. Respondent further felt that because he is almost exclusively a criminal defense attorney, that to require him to serve as an arbitrator in civil cases was an unlawful servitude both in acting as an arbitrator and taking the time to educate himself on civil law

19. Respondent consistently and for the same reasons over the years, refused Court Orders that he serve, and until *Kelleher v Lasker* no court held him accountable for his conduct, presumably because the issue was winding its way through the appellate process in the case cited above, *Scheehle v Justices of the Supreme Court of the State of Arizona* Respondent took a similar position when ordered to serve as an arbitrator in the *Kelleher v Lasker* case

20 On June 8, 2006, Judge Swann of the Maricopa County Superior Court held an Order to Show Cause hearing on why Respondent should not be held in contempt for refusing to serve as an arbitrator in the *Kelleher v Lasker* case. Judge Swann pointed out to Respondent that the most recent *Scheehle* decision had been decided against his position, and after "Mr Gregan was unprepared to discuss the legal merits of the ruling (*Scheehle)* at the hearing and declined to do so," found Respondent to be in contempt, fined him $300 00 and referred the matter to the State Bar The Hearing Officer notes that the *Scheehle* decision referred to by Judge Swann, holding that attorneys could be forced to serve as arbitrators in civil cases, is dated October 5, 2005, predating the OSC Re Contempt hearing by eight months

CONCLUSIONS OF LAW

21 This Hearing Officer makes the following findings·

1 While respondent was acting in accordance with his conscience, he nevertheless refused a direct Court Order Rather than ask for a stay and take a special action to have the Court's Order reviewed and possibly overturned, he ignored a Court's Order

2. Respondent's position that he could not be forced to serve as an arbitrator, while still not clear until October 5, 2005, after that date was crystal clear and he was in error Even as Judge Swann pointed this out to Respondent he had not familiarized himself with the latest *Scheehle* case and did not even ask for time to familiarize himself with the case so a response could be formulated

3 Respondent's actions in defying a Court Order were knowingly made His failure to educate himself on the most recent iteration of *Scheehle* could be considered a knowing act or simply negligent. The Respondent admitted that he did not become aware of the

most recent *Scheehle* case until "just before" the Contempt hearing Observing Respondent's demeanor and responses at the hearing of this matter, this Hearing Officer concludes that Respondent is somewhat embarrassed that he placed himself in this position out of a combination of stubborn pride and negligence The Hearing Officer finds that Respondent was negligent in not apprising himself of the most recent *Scheehle* case

4 That there was actual harm to both the parties in the *Kelleher v Lasker* case and to the effective administration of justice in that the case was prolonged unnecessarily.

22 The Hearing Officer has concluded that Respondent violated his duty under Rule 42, Ariz R Sup Ct , ER 3 4(c), 8 4(d), and Rule 53(c)

ABA STANDARDS

23 ABA *Standard* 3.0 provides that four criteria should be considered: (1) the duty violated, (2) the lawyer's mental state, (3) the actual or potential injury caused by the lawyer's misconduct, and (4) the existence of aggravating or mitigating factors

A) The Duty Violated

24 The Hearing Officer finds that Respondent violated his duty to the profession under Rule 42 and 53 as cited above.

B) Attorney's Mental State

25 The Hearing Officer concludes that Respondent acted knowingly in violating a Court Order, in not taking the appropriate procedural steps in challenging the Superior Court's Order that he serve, and negligently in not educating himself about authority that contradicted his position

C) The Potential or Actual Injury Caused by Respondent's Conduct

26 The Hearing Officer finds that Respondent's conduct in refusing to serve as an arbitrator in the *Kelleher v Lasker* case caused not only harm to the litigants by dragging out the legal process, he also caused prejudice to the administration of justice Respondent's conduct was harmful to the integrity of the judicial process by defying a direct Court Order, and challenging the authority of the Court

27 The Hearing Officer considered *Standard* 6.22 which states

> 6.22 "Suspension is generally appropriate when a lawyer knows that he or she is violating a Court Order or Rule, and causes injury or potential injury to a client or a party, or causes interference or potential interference with a legal proceeding"

And also 7 2 which states

> 7 2 "Suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system

28 Therefore, the presumptive sanction for the Respondent's conduct is a term of suspension. After determining the presumptive sanction, there must be consideration of the aggravating and mitigating factors under *Standard* 9 0

D) Aggravating and Mitigating Factors

29. The Hearing Officer finds the following aggravating factors

- *Standard* 9 22(i) – substantial experience in the practice of law. Respondent has been a member of the Arizona State Bar since May 20, 1995

30 The State Bar submitted information regarding numerous other cases where Respondent refused to act as an arbitrator, claiming this information should offset any consideration by the Hearing Officer that Respondent would be entitled to mitigating factors that Respondent "has no disciplinary history, is remorseful, has learned his lesson, lacked

culpable mental state, and recognizes his legal obligation under the law " (State Bar's legal memorandum re Respondent's refusal to serve as arbitrator, dated August 27, 2007, page 5 lines 11-12) The Hearing Officer finds that Respondent was, in the cases that predated *Kelleher v Lasker*, acting in conformance with his belief that the State Statute did not allow the Court to coerce him to act as an arbitrator The Hearing Officer declines to consider Respondent's refusal to serve in previous cases as a bar to Respondent's proffered mitigation

31 There was one case that occurred after the *Kelleher v Lasker* case, *Justo-Santos v Mary J Peters,* wherein Respondent was appointed to serve as arbitrator and after initial resistance was ordered to serve by Judge Glenn Davis on November 21, 2006, to conduct the arbitration within 30 days Due to continuances not the fault of Respondent, the arbitration was not conducted until spring of 2007, but it was conducted by Respondent

32. While it could be considered in aggravation that Respondent was still dragging his feet even after having been held in contempt and fined $300 00 by Judge Swann, it could also be said that Respondent finally "got it" and complied with the Court Order. It is not clear enough from the evidence to conclude that this was a violation of ABA *Standard* 9 22(d) or (g) It started out that way, but Respondent saw the light at some point and complied with the Court's Order

33 The Hearing Officer finds the following mitigating factors under *Standard* 9 3

- *Standard* 9 32(a) – absence of prior disciplinary record
- *Standard* 9 32(b) – absence of dishonest or selfish motive The Respondent acted out of his firm belief that the wording of the Arizona Statute § 12-1333 only

allowed for those attorneys who "have agreed to serve" to serve as arbitrators and forbade the courts from compelling him to serve as an arbitrator

- *Standard* 9 32(e) – cooperative attitude toward proceedings
- *Standard* 9 32(g) – character and reputation From the witnesses called by Respondent, he has a very good reputation as a competent and skilled criminal defense attorney
- *Standard* 9 32(k) – imposition of other penalty Respondent paid the contempt citation imposed by Judge Swann
- *Standard* 9 32(l) – remorse While Respondent still feels that the statutory language makes service as an arbitrator permissive rather than mandatory, he is remorseful that he did not make himself aware of the second *Scheehle* case and realizes that he must, and has, served as an arbitrator

PROPORTIONALITY REVIEW

34. The Supreme Court has held in order to achieve proportionality when imposing discipline, the discipline in each situation must be tailored to the individual facts of the case in order to achieve the purposes of discipline *In re Wines,* 135 Ariz 203, 660 P 2d 454 (1983) and *In re Wolfram,* 174 Ariz 49, 847 P.2d 94 (1993)

35 In *Leah S Davis* (2003) 02-2305, Davis was ordered on December 14, 2001, to act as arbitrator in a civil action in Maricopa County Superior Court On June 19, 2002, Davis was ordered to conduct the arbitration within 60 days Davis did not comply, and an OSC Re Contempt was set on November 17, 2002 Davis failed to appear Another OSC Re Contempt was set on December 17, 2002 In the interim, the State

Bar sent Davis a letter on December 11, 2002, regarding her conduct and requesting that she respond within 20 days Davis failed to respond to the State Bar's letter

36 Davis appeared at the December 17, 2002, OSC Re Contempt and, having no excuse for her earlier failure to appear and failure to complete the arbitration, was held in contempt, and in order to purge herself of the contempt, ordered to preside over four arbitration cases

37. Davis continued to not respond to the State Bar in spite of two further efforts to contact her in January 2003 (re-sending its December 11, 2002, letter to the new address she provided) and another letter on February 3, 2003 Respondent only began to cooperate after the complaint was filed

38 In the *Davis* case, *Standard* 6 22 (suspension is generally appropriate when a lawyer knowingly violates a Court Order and there is injury or potential injury or interference with a legal proceeding) was found to be applicable, as was *Standard* 7 2 (suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to the legal system)

39 From the presumptive of suspension, the *Davis* case then considered the aggravating and mitigating factors Four mitigating factors were found and three aggravating factors were found A weighing of these factors resulted in a downward deviation from suspension to censure Davis received a censure and probation

40 In *Courtland Merchant* (2000) 98-2026, Merchant violated a Court Order to serve as an Arbitrator after her request to be removed was denied Merchant failed to appear at an OSC Re Contempt, failed to pay the fine, failed to cooperate with the State Bar's request

for information, and failed to respond to or attend proceedings which resulted from the filing of a Formal Complaint Merchant's conduct was found to be knowing Respondent was suspended for 6 months and one day

41 In *Michael D Bingham* (2002) Disciplinary Commission No 00-1769, Bingham was administratively suspended on April 2000 for nonpayment of dues and Mandatory Continuing Legal Education noncompliance Previously Bingham was ordered three times to set an arbitration before a specific date and failed to do so Bingham failed to appear at an OSC Re Contempt, and also failed to respond to the State Bar's inquiries Two aggravating factors were found bad faith obstruction of disciplinary proceedings and substantial experience in the practice of law One mitigating factor was found: no prior disciplinary record Based upon these findings, Bingham received a six-month and one day suspension

42 The factors that distinguish these cases, all involving attorneys who did not perform their arbitration duties, starts with, of course, the sanction Davis received a censure and probation, whereas Merchant and Bingham were both suspended. An examination of the facts shows that Davis initially failed to appear at her OSC hearing, but then appeared at a subsequent hearing on that issue To purge herself of the Contempt, Davis was required to conduct four arbitrations which she presumably did

43 Davis also initially failed to cooperate with the State Bar and did not do so until the Complaint was filed, but thereafter did cooperate Finally, Davis had four mitigating factors and three aggravating factors

44 Contrasting Davis with Bingham and Merchant, neither of these respondents either appeared for their Contempt hearing, or ever cooperated with the State Bar These cases

illustrate the value of appearing when directed to do so to receive your sanction and cooperating with the State Bar These combined factors, plus an imbalance of mitigation over aggravation, resulted in a censure for Davis rather than a suspension

45 In this case, Respondent did appear for his Contempt hearing and cooperated with the State Bar, therefore, a reduction in the presumptive sanction of suspension is justified given the significant mitigating factors present and upon review of previous cases involving similar misconduct

46 When addressing the aggravating and mitigating factors in this case, it is clear that Respondent here has one aggravating factor and six mitigation factors

47 While this Hearing Officer is not just a little concerned that Respondent, at least through negligence and at worst intentionally kept himself ignorant of the second *Scheehle* case, that low level of competence, or perhaps defense mechanism, is not at all reflective of the high degree of professionalism that his character witnesses said Respondent possesses It may not rise to the level of an aggravating factor, but it certainly blemishes his integrity

RECOMMENDATION

48 The purpose of lawyer discipline is not to punish the lawyer, but to protect the public and deter future misconduct *In re Fioramonti,* 176 Ariz 182, 187, 859 P 2d 1315, 1320 (1993). It is also the objective of lawyer discipline to protect the profession and the administration of justice *In re Neville,* 147 Ariz 106, 708 P 2d 1297 (1985). Yet another purpose is to instill public confidence in the Bar's integrity *Matter of Horwitz,* 180 Ariz 20, 29, 881 P 2d 352, 361 (1994)

49 In imposing discipline, it is appropriate to consider the facts of the case, the American Bar Association's *Standards for Imposing Lawyer Sanctions ("Standards")* and the proportionality of discipline imposed in analogous cases *Matter of Bowen,* 178 Ariz 283, 286, 872 P 2d 1235, 1238 (1994)

50 Upon consideration of the facts of this case, application of the *Standards,* including aggravating and mitigating factors, and a proportionality analysis, this Hearing Officer recommends the following

1 Respondent shall receive a Censure

2 Respondent shall be on probation for two years with the standard terms, plus Respondent shall be required to receive at least six hours of mentoring by an attorney experienced in conducting civil arbitrations so that Respondent can better learn to use his considerable lawyering skills in his future conduct of arbitrations This mentoring must be accomplished within 6 months of the approval of this Order by the Supreme Court

3 Respondent will pay all costs and expenses incurred by the State Bar in this proceeding

4 In the event that Respondent fails to comply with the terms of probation and information thereof is received by the State Bar, bar counsel shall file a Notice of Non-Compliance with the imposing entity, pursuant to Rule 60(a)(5), Ariz R Sup Ct The imposing entity may refer the matter to a hearing officer to conduct a hearing at the earliest practicable time, but in no event later than thirty days after receipt of notice, to determine whether a term of probation was breached, and, if so, to recommend an appropriate action and response If there is an allegation that Respondent failed to

comply with any of the foregoing terms, the burden of proof shall be on the State Bar to prove non-compliance by clear and convincing evidence

DATED this 20th day of November, 2007

Hon. H Jeffrey Coker /as
H Jeffrey Coker, Hearing Officer

Original filed with the Disciplinary Clerk
this 20th day of November, 2007

Copy of the foregoing mailed
this 21st day of November, 2007, to:

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